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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission

Washington, D.C. 20554

In re Applications of)	MM DOCKET NO. 93-107
DAVID A. RINGER)	File No. BPH-911230MA
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
SHELLEE F. DAVIS)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC
For a Construction Permit for)	
a New FM Station on Channel)	
280A at Westerville, Ohio)	

To: Honorable Walter C. Miller
Administrative Law Judge

To: The Review Board

EXCEPTIONS TO INITIAL DECISION

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SUMMARY

This was a five party comparative case for a new FM station at Westerville, Ohio. The Presiding Judge selected Shellee Davis ("Davis") as the comparatively superior applicant. David A. Ringer now appeals from that decision.

Ringer argues that the Presiding Judge did not adequately consider the record evidence that shows that Davis will never be able to divorce herself from her successful office equipment business in order to commit full-time to the new radio station. The Presiding Judge erred when he failed to find that Ms. Davis' wavering and evasive testimony had destroyed her credibility. Furthermore, the record shows that Ms. Davis will never be able to sell her company, for it is nothing without her.

Finally, Ringer challenges the Judge's award of 100 percent integration credit to ASF. As shown in the record below, ASF's enabling documents failed to contain fundamental provisions which would insulate its purported two-tier structure. Furthermore, the history of how the partnership was formed should have been enough for the Judge to find ASF's ownership structure unreliable.

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EXCEPTIONS TO INITIAL DECISION

David A. Ringer ("Ringer"), by and through counsel, and pursuant to §1.276 and §1.277 of the Commission's Rules (47 C.F.R. §1.276 & §1.277), hereby submits his Exceptions to the Initial Decision, FCC 93D-22, released November 18, 1993 ("ID"), in the above-captioned proceeding.¹ In support whereof, the following is shown:

I. BACKGROUND

1. This is a five party comparative proceeding for a new FM station on Channel 280A at Westerville, Ohio. The case was decided based upon the Commission's standard comparative issue. Upon comparative consideration, all but

¹ The Presiding Judge split his ID into two parts, each numbered differently. Therefore, citations to the Findings portion of the ID shall be: "F##." Citations to the Conclusions portion of the ID shall be: "C##."

one of the remaining five applicants were granted 100% integration credit. See ID at C11-C12. ORA Radio Associates, Inc. ("ORA") never claimed any integration credit and thus none was awarded to them. Id. Similarly, all but one applicant was judged to have a perfect diversification record. See ID at C4-C5. ASF Broadcasting Corporation ("ASF") received a substantial demerit for the ownership interests of its purported non-voting stockholder, Thomas J. Beauvais. ORA's lack of integration credit and ASF's diversification demerit quickly eliminated their applications from further comparative consideration. See ID at C19-C24.

3. Of the three remaining applicants, the Presiding Judge found Shellee Davis ("Davis") to be the superior applicant because of her record of local residence, past civic involvement and minority enhancement. Id. Ringer now appeals from this decision.

II. ISSUES PRESENTED

- A. Whether the Presiding Judge erred by awarding 100% full-time integration credit to Davis?
- B. Whether the Presiding Judge erred by awarding 100% integration credit to ASF?

III. ARGUMENT

A. The Presiding Judge Erred By Awarding 100% Full-Time Integration Credit To Davis

4. In his ID, the Presiding Judge essentially ignored the most important issue in this proceeding - whether Shellee Davis' will realistically be able to divorce herself from her current business interest in order to commit full-

time at the new radio station. While all of the other applicants spent the bulk of their Findings and Conclusions presenting lengthy arguments on this issue, the Presiding Judge gave it a mere line or two and two minor footnotes in his ID. See ID at F49-F50 and footnotes 5-6. It is not surprising, therefore, that he came to the incorrect conclusion on this issue.

5. In footnote 6 to his ID, the Presiding Judge started down the right path when he found that "It's hard to envision Ms. Davis leaving a highly-successful, unmortgaged business for a mortgaged, untried, FM operation for which she has no experience." ID at n. 6. However, rather than pursue these doubts and make a full examination of the record concerning Ms. Davis' integration proposal, the Judge simply accepted her bald statement - that she will terminate all other paid employment in order to fulfill her integration proposal. See ID at F50. However, the record reveals several reasons why this pledge is neither believable nor realistic.

6. For example, the Presiding Judge gave no consideration to the fact that Ms. Davis gave wavering and evasive testimony on at least two occasions, of the type that should have raised doubts as to her ability to provide the Commission with credible evidence. As shown in Ringer's Findings and Conclusions (§§26-27), Ms. Davis attempted to hide her true income from Britt Business Systems, her

wholly-owned office equipment supply company, in an attempt to downplay its success and create the appearance that she would be able to walk away from it at any time. However, upon repeated questioning from the Presiding Judge, Ms. Davis finally admitted that her actual income from her copier business was \$106,000, much larger than the \$25,000 she originally claimed. See Hearing Transcript (herein referred to as "Tr. #") at pp. 421-426.

7. Furthermore, as a result of Ms. Davis' equivocal testimony, the record is filled with inconsistent evidence concerning the role played by her brother-in-law, Ben Davis, in her equipment company. Ms. Davis testified that Ben Davis was her employee and that he ran the Cleveland office of her company. Tr. 437. However, at a different point in her testimony she testified that, while Mr. Davis has a separate operation in Cleveland from which he keeps all the profits, he is not a partner in her company. Tr. 431 & 437. Finally, it was shown that Shellee Davis had told two different publications that her brother-in-law was her partner and/or an officer in her corporation. Id.

8. While these inconsistencies may, at first glance, appear unimportant, they are illustrative of how Ms. Davis' has attempted to portray a false image of her company before the Commission and how she has tailored the depiction of her company to fit the needs of the current situation. For example, when she was being interviewed by a trade magazine

or receiving an award for her entrepreneurial abilities, Ms. Davis' has depicted her company as thriving and successful and her role as indispensable. See Davis Ex 1, Attachments A, B, E, G & J. However, as demonstrated above, when she was before the Commission, Ms. Davis falsely reported her company's success, as well as the income she derives from it, in an attempt to show that she will have no reservations leaving it for the new radio station. Furthermore, through her confusing testimony, Ms. Davis attempted to show that her brother-in-law was already running part of her business, thus creating the false image that her continued daily involvement is no longer necessary. Given such false and inaccurate evidence, it is questionable how the Presiding Judge could have accepted Ms. Davis' integration proposal without a more thorough investigation.

9. Also puzzling was the Judge's failure to carefully consider all of the evidence that directly contradicted Ms. Davis' claim that she will simply sell her one million dollar a year, booming office equipment company, when the time comes, to begin committing full-time to the new radio station. For example, the Judge never investigated the record evidence that showed that Ms. Davis' business, while successful, was so solely because of her presence and personal involvement. See Findings at ¶28. The record further showed that it has been Ms. Davis that has been personally nurturing her biggest clients "from day one."

Tr. 378-79. She admitted that her customers look to her for her personal guarantee. Tr. 379-80 and Davis Ex. 1 at Attachment A. Therefore, this evidence shows that her equipment company is worthless without her on-going, daily presence.

10. These facts cast a serious doubt over Ms. Davis' claim that she will simply find a buyer for her business when the appropriate time comes.² Without a buyer, there exists the more serious doubt of whether Ms. Davis will terminate her relationship with her thriving equipment business (which the Judge pointed-out is debt-free), and begin a new risky venture for which she has no past experience. For the Judge to have ignored such important evidence was error.

11. Ms. Davis is hopeful that she will one day find a buyer for her copier business. However, the record shows that potential buyers would be buying a mere shell of a company, with no real products to sell. Her contract with Panasonic is not assignable. See Ringer Ex. 5 at \$16B. Her contract with Xerox, which accounts for 80 to 85 percent of her business, can be assigned, but only if Ms. Davis gives them proper notice and Xerox grants its consent. See Ringer Ex. 6 at \$L.1.1. However, in its contract, Xerox states

² Ms. Davis claims that some of the success of her business can be attributed to her staff of nine employees; however, Ms. Davis testified that she intends to take two of her more valued employees with her to the new radio station. Tr. 382.

that it entered into its relationship with Ms. Davis because of her proposed personal involvement in the business, as evidence by the fact the contractual relationship is based upon her knowledge of the territory to be served and her ability to market Xerox's products. Id. Given this representation, it is questionable whether Xerox will permit Ms. Davis to sell her business to just any buyer. The record is silent on this point, mainly because Ms. Davis has never given Xerox any notice of her plans to work full-time at the new radio station, but also because she failed to provide any evidence concerning Xerox's feelings on the matter. Therefore, it is fair to assume that any evidence concerning Xerox's position on this issue would have been unfavorable to Ms. Davis. See Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3952-3 (Rev. Bd. 1988), citing, 2 Wigmore on Evidence, §285 (1940); and McCormick on Evidence, §272 (1984). Despite these facts, the Presiding Judge gave no serious consideration to this matter.

12. Had the Presiding Judge thoroughly considered the above-referenced evidence, he would have been forced to arrive at a different conclusion - that Shellee Davis has not met her burden of proving that she is entitled to full integration credit. See Victorson Group, Inc., 6 FCC Rcd 1697, 1699 (Rev. Bd. 1991)(citations omitted). Her failure to show how she will accommodate her outside business interest should have resulted in a reduction in her

integration credit. Id. The Judge's failure to do so was error.

B. The Presiding Judge Erred By Awarding 100% Full-Time Integration Credit To ASF

13. In a confusing aspect to the case, the Presiding Judge awarded 100 percent integration credit to ASF but attributed the other broadcast interests of its non-voting stockholder, Thomas J. Beauvais. See ID at F15 and C11. However, if the Judge agreed with the other applicants, that ASF's ownership structure was inherently unreliable, then he should have fully attributed Mr. Beauvais' interests and reduced ASF's integration credit to 25 percent, reflecting the equity interest of its voting-stockholder, Ardeth Frizzell, the sole ASF principal to put forth a full-time integration proposal. See Royce International, 5 FCC Rcd 7063, 7064 (1990).

14. The record shows that not only is ASF's ownership structure fundamentally flawed, but the history of how its two principals met and formed their partnership renders ASF's purported two-tier structure extremely unreliable. As the Judge recognized in his ID, ASF's Shareholder's Agreement failed to contain some of the most important insulation provisions required by the Commission in the case of a structured applicant. See ID at n. 4. For example, ASF's Agreement does not prohibit its non-voting stockholder from: (a) direct employment at the station; (b) serving as an independent contractor to the station; (c) transacting

business on behalf of the corporation; or, more importantly, (d) communicating with the voting-stockholder on the day-to-day operations of the station. See Wilburn Ex. 3. The omission of these rudimentary insulation provisions from ASF's enabling document should have been sufficient to warrant the denial of full integration credit. See Evergreen Broadcasting Co., 6 FCC Rcd 5599 (1991), recon. denied, 7 FCC Rcd 6601 (1992). The Judge's failure to recognize these fatal errors and to award ASF 100 percent integration credit was error.

15. Even if the Judge was able to forgive the omissions from ASF's Shareholders Agreement, the remainder of the record evidence present a scenario strikingly similar to those in previous Commission proceedings, where an applicant's integration proposal was found to be too unreliable to support an award of integration credit. In Eugene Walton, 6 FCC Rcd 6071, 6077 (Rev. Bd. 1991), the Board denied credit to an applicant where the limited partner: (a) had met the general partner a mere two days before filing their application; (b) did not previously know the general partner and recruited her after a single meeting; (c) suggested the form of the limited partnership agreement; and (d) the limited partnership agreement did not prohibit the limited partner from communicating with the general partner about day-to-day activities of the station. Here, the record shows that the non-voting stockholder, Mr.

Beauvais: (a) met his voting-stockholder, Ms. Frizzell, for the first time, shortly before filing their application; (b) did not know Ms. Frizzell and did nothing to check on her professional or financial background prior to filing; (c) suggested the form of the Shareholders Agreement (the exact form that he had used in a previous FCC filing), which was not materially edited, an Agreement that did not bar Mr. Beauvais from being an employee, independent contractor or agent for the station or from communicating with Ms. Frizzell on the day-to-day activities of the station. See Findings at ¶¶12-15.

16. As with the applicant in Eugene Walton and countless other Commission proceedings, the facts in this case show a limited partner that has given away control of the applicant "in a manner that is patently unreasonable on its face...." Eugene Walton, 6 FCC Rcd at 6077. The Judge should have recognized that the actions of ASF's principals in this case "run[s] contrary to reasonable business judgment since, in a legitimate business transaction, one would expect the...(parties) to study the situation more carefully before committing themselves." Poughkeepsie Broadcasting Limited, 6 FCC Rcd 2497 (1991). ASF's integration credit, therefore, should have been substantially reduced.

IV. CONCLUSION

17. If the Presiding Judge had properly reduced the

integration credit awarded to Davis and ASF, he would have had to choose Ringer's application as comparatively superior. Mr. Ringer's 100 percent full-time integration credit, enhanced by his limited record of local residence,³ his broadcast experience and auxiliary power proposal would have made his application superior and his application should have been preferred.⁴

³ The Presiding Judge also erred by failing to award any credit to Mr. Ringer's residency at 417 West Sixth Avenue, Columbus, Ohio. See ID at n. 3. While he moved to this residence after he filed his application, some slight amount of credit was due.

⁴ During the pendency of this appeal, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in Bechtel v. FCC, Dkt. No. 92-1378, released December 17, 1993. In that case, the Court concluded that the Commission's "integration preference is peculiarly without foundation" and ordered the Commission to make its licensing decisions "under standards free of that policy." Bechtel v. FCC, slip opinion, at pp. 22-23. Given the Court's action and the fact that the Commission has yet to issue a response, Ringer hereby reserves the right to supplement these Exceptions, upon the release of the Commission's modified comparative criteria.

WHEREFORE, the above-premises considered, David A. Ringer respectfully requests that the Initial Decision in this case be reversed, as outlined herein, and that his application for a new FM station at Westerville, Ohio be **GRANTED**.

Respectfully submitted,

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December 20, 1993

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CERTIFICATE OF SERVICE

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